KAPLANDS SDN BHD

v.

LEE CHIN CHENG DENGKIL OIL PALM PLANTATIONS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MUHAMMAD KAMIL AWANG J
[CIVIL SUIT NO: 22-321-1998]
22 JUNE 2001

CONTRACT: *Construction - Sale and purchase agreement - Sale and purchase of land - Undertaking to transfer land "free from encumbrances" - Meaning of "encumbrance" - Collateral contract - Alterations to agreement not reduced to writing - Whether ineffective*

LAND LAW: *Sale of land - Caveat - Land to be transferred "free from encumbrances" - Meaning of "encumbrance" - Private caveat - Whether an encumbrance within context of National Land Code 1965*

The defendant is the proprietor of a parcel of land in Dengkil, Selangor Darul Ehsan ('the land'). By a sale and purchase agreement dated 2 July 1997 ('the S&P agreement'), the defendant sold the land to the plaintiff and accepted a 10% deposit of the purchase price thereof. The S&P agreement stipulated that upon the completion date therein, the plaintiff would pay the balance purchase price and the defendant would transfer the land free from all encumbrances and with vacant possession. The plaintiff discovered that upon the completion date, a certain private caveat had remained lodged against the land. That being so, the plaintiff refused to pay the balance sum and subsequently brought the present action against the defendant claiming for the recovery of the 10% deposit in accordance with the terms of the S&P agreement. The defendant argued that the plaintiff was not entitled to the deposit, as a private caveat did not constitute an encumbrance, and further that, the S&P Agreement aside, there was an oral agreement between the parties not to treat the said caveat as an encumbrance to the land.

Held:

[1] The parties had intended in the S&P agreement that on the completion date the land would be handed over by the defendant to the plaintiff "free from all encumbrances and with vacant possession". This is well reflected in cl. 2.1 of the agreement. (p 357 c-i)

[2] The word "encumbrance" does not merely consist of conditions or restrictions in interest that normally appears in a document of title to land. It encompasses any matter concerning the land or its owner when any such matter, for example, fetters the right of the owner to deal with his land or to enjoy his land in the normal way. A private caveat, hence, is an encumbrance within the context of the National Land Code 1965. (p 358 g)

[3] An amendment to a written agreement must be agreed to by both parties to the agreement and must adhere faithfully to the terms of the amendment clause and must be in writing. Nothing of this sort happened here. Thus the alleged amendment would have no effect on the S&P agreement. The alleged amendment was also not pleaded and such failure is fatal to the defendant's case. (p 359 e-f)

[4] The phrase "in its present state and condition" appearing in the recital of the S&P agreement cannot replace the term "free from all encumbrances and with vacant possession" appearing in cll. 2.1 and 11.1 of the S&P agreement. The latter phrase remains a fundamental term of the agreement and it clearly has been breached. (p 360 d)

[Plaintiff's claim allowed.]

Case(s) referred to:

Damodaran v. Choe Kuan Him [1979] 2 MLJ 267 ***(refd)***

Faber Merlin (M) Sdn Bhd & Ors v. Lye Thai Sang & Anor, Tan Kim Chua Realty (M) Sdn Bhd v. Lye Thai Sang & Anor [1985] 2 MLJ 380 ***(refd)***

Gimstern Corporation (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 ***(foll)***

Kanagasabai Satkuru v. United Malayan Banking Corporation [1981] 2 MLJ 23 ***(refd)***

Karuppannan v. Balakrishnen (Chong Lee Chin & Ors, Third parties) [1994] 4 CLJ 479 ***(foll)***

Mewah Plus Property Sdn Bhd v. Kluang District Government Servants Co-Operative Housing Society Limited [2000] 2 CLJ 236 ***(refd)***

Ria Enterprise & Ors v. Mbf Finance [2001] 1 CLJ 687 ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***

For the plaintif - Dato' Mahinder Singh Dulku (Shahidah Aris); M/s Mahinder Singh Dulku & Co

For the defendant - Ben CC Choon (Andrew Chew); M/s Lee Hishammuddin

Reported by WA Sharif

JUDGMENT

Muhammad Kamil Awang J:

The defendant is the proprietor of a parcel of land known as Lot 6984, Mukim Dengkil, Daerah Sepang, Selangor ("the said land"), sold the said land to the plaintiff and pursuant to a sale and purchase agreement between the plaintiff and the defendant dated 2 July 1997 (the S&P agreement) the plaintiff had paid the defendant a deposit, RM3,930,875 (10% of the purchase price) thereto.

According to cl. 2 of the S&P agreement the balance of the purchase price of RM35,377,875 (90% of the purchase price) shall be paid in three months of the date of the S&P agreement and within seven days after an approval of the foreign investment committee was obtained.

Subsequently, the parties mutually agreed that the balance of the purchase price to be paid on 19 February 1998 (ie, the completion date). Clause 2.1 of the S&P agreement provided that the said land must be free from all encumbrances and with vacant possession on the completion date. There were three private caveats lodged in the said land; *viz*:

(1) MPI Paper Mill Sdn Bhd dated 9 January 1995 (the MPI caveat);

(2) Straw Paperboard Industries dated 24 October 1997 (the SPl caveat); and

(3) Golden Skyline Sdn Bhd dated 18 December 1998 (the GS caveat).

The plaintiff had still not paid the balance of the purchase price of the said land by 19 February 1998 as agreed because the said land was not free from encumbrances in accordance with the terms of the S&P agreement. In a letter dated 20 February 1998 the plaintiff terminated the S&P agreement. The plaintiff brought this action against the defendant for the recovery of the deposit in accordance with the terms of the S&P agreement.

The plaintiff claimed that the payment of the balance of the purchase price was due on 19 February 1998 but it did not pay because the said land was not free from encumbrances, *ie*, the MPI caveat had not been removed. That being so, the plaintiff had exercised the option to terminate the S&P agreement, and claimed for the refund of the money which it had paid as a deposit with the plaintiff upon signing the S&P agreement.

The defendant submitted that the MPI caveat was lodged on 9 January 1995 and its existence was known to the plaintiff at the time when the S&P agreement was signed by the parties on 2 July 1997. The defendant alleged that at a meeting (after the S&P agreement had been signed) between the parties solicitors, where KK Chew (a director of the plaintiff) was also present, they had agreed to vary a term of the S&P agreement that the MPI caveat

was not to be regarded as on encumbrance in the said land. Further, it was agreed that on 19 February 1998 the plaintiff would pay the balance of the purchase price and the defendant would hand over the completed transfer form of the said land to the plaintiff. Thus, the plaintiff had breached the S&P agreement and the defendant was entitled to forfeit the deposit.

The defendant submitted that "a private caveat is not an encumbrance to the land", and in support he cited the Privy Council case of *Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267.

It is abundantly clear that the parties had intended in the S&P agreement that on the completion date (ie, 19 February 1998), the said land would be handed over by the defendant (vendor) to the plaintiff (purchaser) "free from all encumbrances and with vacant possession". This is well reflected in the S&P agreement:

Clause 2.1 thereof, *inter alia*, states:

> ... the Vendor hereby agrees to sell and the Purchaser agrees to purchase the said Property ... **free from all encumbrances and with vacant possession** ... (emphasis provided)

Clause 11.1 therein stated:

> **Vacant possession** of the said property shall be delivered by the Vendor to the Purchaser on the completion date.

The recital (B) states:

> Whereas:
>
> (B) The Vendor has agreed to sell and the Purchaser has agreed to purchase the said property **free from all encumbrances and with vacant possession** and it is in its present state and condition but subject to all conditions of title whether expressed or implied, all unregistered easement (if any) affecting the same, and the existing category of land use affecting the said property and subject to the terms and conditions hereinafter contained. (emphasis provided)

Under the definition cl. 1.1.3:

> "Completion Date" means the date on which the full price has been paid by the Purchaser in accordance with clause 2 hereof and all other sums due from the Purchaser to the Vendor hereunder has been paid in full by the Purchaser.

This (cl. 2.1) is a fundamental term of the S&P agreement, which has truly defined the intention of the parties in the S&P agreement. However, a term may be varied or amended by the parties as provided under cl. 21.3 therein, which clearly states:

> No amendment of, or addition to the provisions of this Agreement shall be binding and effective unless it is in writing signed by all the parties hereto.

In the instant case, there is no documental evidence of an amendment or variation to the term or phrase "free from all encumbrances and with vacant possession" in cl. 2.1 thereof. This is an express intention of the parties and it cannot be easily set aside or replaced by parole or extrinsic evidence. Moreover, in a commercial sale of this nature the term "free from all encumbrances and with vacant possession" is the norm and not an exception.

The word "encumbrance" is not defined in the S&P agreement. Then what is an "encumbrance" as envisaged in the National Land Code 1965?

In a recent Court of Appeal case of *Mewah Plus Property Sdn Bhd v. Kluang District Government Servants Co-Operative Housing Society Limited* [2000] 2 CLJ 236, Gopal Sri Ram JCA at p. 241 said:

> As to what amounts to an encumbrance in the context of the National Land Code, reference may usefully made to two decisions of the Privy Council on the point.

At line 21, on the same page:

> The second is *Letchumanan Chettiar v. Palaniappa Chettiar* [1983] 1 MLJ 6, where Lord Templeman referred to a caveat upon the register as 'the only relevant encumbrance', thereby rendering a wider meaning to that expression than that given it by Lord Diplock in *Damodaran v. Choe Kuan Him (ibid).*

In *Karuppannan v. Balakrishnen (Chong Lee Chin & Ors, Third parties)* [1994] 4 CLJ 479 the Federal Court considered the meaning of the word "encumbrance", Lamin FCJ at p. 485 said:

> The word 'encumbrance' does not merely consist of conditions or restrictions in interest that normally appear in a document of title to land. It encompasses any matter concerning the land or its owner when any such matter, for example, fetters the right of the owner to deal with his land or to enjoy his land in the normal way ... .

In view of the authorities above, I hold that a private caveat is an encumbrance within the context of the National Land Code, and it applies to the instant case.

Learned counsel for the defendant submitted further that the court is entitled "to look at the surrounding circumstances for purpose of ascertaining the intention of the parties whether MPI caveat was intended to be an encumbrance in the agreement". Such course of action was disapproved by the Court of Appeal in *Mewah*'s case *(supra)* where at p. 242 the learned JCA said:

> The short answer to this submission is that the agreement has to be interpreted in accordance with the language employed by the parties to express their intention ... . The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties intentions must be ascertained, on legal principles of construction, from the words they used ... .

See *Faber Merlin (M) Sdn Bhd & Ors v. Lye Thai Sang & Anor, Tan Kim Chua Realty (M) Sdn Bhd v. Lye Thai Sang & Anor* [1985] 2 MLJ 380 [SC] and *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229 [FC].

When the intention of the parties is clearly expressed in written words of the agreement I do not think it is incumbent upon the court to look at the surrounding circumstances in order to find the intention of the parties. Beware that you do not lose the substance by grasping at the shadow: Eesop Fables "The Dog and the Shadow".

Collateral Contract

The defendant averred that the parties, KK Chew (a director of the plaintiff) and DW1 (counsel for the defendant) in the presence of DW3 (counsel for MPI), had agreed that the MPI caveat was not to be treated as an encumbrance in the said land. This alleged variation or amendment was not incorporated in the S&P agreement. DW1 and DW3, both are lawyers by training, surely they know or ought to have known that an amendment to a written agreement must be agreed to by the parties to the agreement and must adhere faithfully to the terms of the amendment clause and must be in writing. Nothing of this sort happened here. Thus the alleged amendment would not be effective and fail. With respect, I cannot accept the contention of the learned counsel for the defendant that the agreement allegedly made by the parties at a meeting after the S&P agreement had been signed, would dramatically change the term "free from all encumbrances and with vacant possession". It is trite law that an amendment to a provision in an agreement must be agreed to by the parties and made in writing. (see cl. 21.3).

More importantly, the alleged contract has not been pleaded in the defence. Failure to plead it is fatal to the defence. In *Gimstern Corporation (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302, the Supreme Court held:

> These issues brought up at the trial had not been pleaded in the Statement of Defence, and this is a contravention of Order 18 Rule 8 of the Rules of the High Court, and therefore the contentions should not have been entertained (*Attorney-General v. Lord Mayor etc. of City of Sheffield*).

In *Kanagasabai Satkuru v. United Malayan Banking Corporation* [1981] 2 MLJ 23, the Federal Court held:

a First and foremost that question that must necessarily be considered is whether the question raised by the appellant was an issue disclosed by the pleading. It is a cardinal principle of law that a judge is bound to decide a case on the issues on record (see *Hj. Mohd Dom v. Sakiman*).

In *Mewah*'s case *(supra)* the Court of Appeal held:

b In the absence of a pleaded case to that effect, it is not the function of the court to imply such term ...

See also *Ria Enterprise & Ors v. Mbf Finance* [2001] 1 CLJ 687.

c The defendant contended that at the time of signing the S&P agreement the MPI caveat was in existence and the plaintiff had accepted it "in its present state and condition subject to all conditions of title..." as stated in recital (B) above.

In my view, the phrase "in its present state and condition" does not replace d the term "free from all encumbrances and with vacant possession". Moreover, this phrase appears in the recital, it cannot override the cll. 2.1 and 11.1 as contained in the S&P agreement. Thus "free from all encumbrances and with vacant possession" remains a fundamental term of the S&P agreement and at the completion date, the said land was not "free from all encumbrances and e with vacant possession." It is clear that cll. 2.1 and 11.1 had been breached.

Assuming that the parties had intended and agreed that the MPI caveat was not an encumbrance prior to or at the time S&P agreement was signed, this would have been superseded by cl. 21.5.

f Clause 21.5 of the S&P agreement states:

This Agreement supercedes any other agreement, letters, correspondence (oral, written or expressed or implied) entered into prior to this agreement in respect of matters dealt with in this agreement.

g Now we look at cl. 10.2 of the S&P agreement which governed the procedure to be adopted by the plaintiff when a default occurred. Clause 10.2 states:

If the Vendor fails to complete the sale of the Said Property to the Purchaser in accordance with the terms and conditions set out herein or if the Vendor shall default in any other obligations on the part of the Vendor to be performed h and observed in this Agreement and such default is not rectified by the Vendor within seven (7) days of notice of such default given by the Purchaser, the Purchaser shall be entitled to at its option to either:

(a) take such action as may be available to the Purchaser at law to claim for specific performance of this Agreement together with all relief flowing i therefrom; OR

(b) terminate this Agreement by notice to the Vendor whereupon the Vendor shall refund to the Purchaser the deposit together with any sum in excess thereof paid by the Purchaser towards the Purchase Price free of interest in exchange wherefore the Purchaser shall return or cause to be returned to the Vendor all documents delivered by the Vendor or the Vendor's Solicitors to the Purchaser's Solicitors and/or the Purchaser's Financiers or its Solicitors together with valid and registrable withdrawal of caveats lodged by the Purchaser and/or the Purchaser's Financiers accompanied by the necessary registration fees.

Thereafter this Agreement shall be null and void and of no further force or effect and neither party shall have any claim whatsoever against the other and the Vendor shall be entitled at its absolute discretion to sell or otherwise deal with the Said Property in such manner as the Vendor shall deem fit.

It is noted that what the plaintiff need to do when a breach of the S&P agreement occurs, is that he must serve on the defendant a seven days notice of such default, and thereafter he is entitled to (a) specific performance or (b) terminate the S&P agreement.

From the facts of the case, the completion date was 19 February 1998 and the plaintiff rescinded the S&P agreement on the following day, ie, 20 February 1998. It seems that in its anxiety to rescind the S&P agreement it fails to observe cl. 10.2. The plaintiff submitted that there is no requirement of a seven day notice in view of the exchange of letters between the plaintiff and the defendant's letters, as shown below:

In the plaintiff s letter dated 21 November 1997 (pp. 37 and 38 of bundle B), para (d) states:

(d) that at the end of three months period as stipulated in (a) above the Vendor fails to clear the title from encumbrances, Kaplands shall have the option to abort the purchase and upon exercise of such option by Kaplands, the Vendor shall refund to Kaplands the deposit already paid including interest or to grant a further extension of time thereon.

In reply, the defendant's solicitor in its letter dated 24 November 1997 stated that "we confirm that our clients have agreed to the following pursuant to your letter to us dated 21 November 1997" and repeated para d (p. 42 of bundle B).

In his testimony (at p. 20 of notes) DW2 (a director of the defendant) rationalised that:

10.2 notice was not given because of para (d) of the solicitor's letter.

The defendant seemed not to be serious about this cl. 10.2 because upon the receipt of the termination letter, the defendant served upon the plaintiff a letter claiming for the forfeiture of the deposit. By the same token, analogous to cl. 10.2, the defendant had not served a seven day notice to the plaintiff, as cl. 10.2 has imposed a duty to serve notice on one party, it is equally applicable to the other party, otherwise it offends the notion of justice.

It is clear that in view of this evidence, breach of cl. 10.2 is not fatal. By the acts of the parties, they are no longer bound strictly by cl. 10.2.

On a balance of probabilities, the plaintiff has, on the evidence as a whole, proved its claim and I would allow the plaintiff's claim as prayed with costs to be taxed unless agreed.